AUG 6 - 2004
OFFICE OF THE CLERK

No. 03-636

IN THE
Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF BLACK LAW ENFORCEMENT OFFICERS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813

Attorney for Amicus Curiae

TABLE OF CONTENTS

Interest of *Amicus Curiae* 1

Summary of Argument 2

ARGUMENT

A. Upholding The Policy Does Not Require Departure From *Washington* 4

B. Strict Scrutiny Would Not Invalidate The Policy 11

1. Defendants Have A Compelling Interest In Protecting Inmates From Race-Based Violence During The Evaluation Process 12

2. The Record Establishes That No Improper Purposes Or Assumptions Are Is Operative 17

3. The Policy's Supposed "Overinclusiveness" Has No Bearing On The Equal Protection Question .. 27

Conclusion 30

TABLE OF AUTHORITIES

Cases

Adarand Constructors, Inc. v. Peña,
515 U.S. 200 (1995) 11, 22

Benton v. Maryland, 395 U.S. 784 (1969) 16

Black v. Lane, 824 F.2d 56 (7th Cir. 1987) 21

Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) 23

Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687 (1994) 6

Brewer v. W. Irondequoit Cent. Sch. Dist.,
212 F.3d 738 (2d Cir. 2000) 21, 24

Brown v. City of Oneonta, 195 F.3d 111 (2d Cir. 1999) .. 20

Califano v. Webster,
430 U.S. 313 (1977) (*per curiam*) 19

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,
508 U.S. 520 (1993) 18

City of Cleburne v. Cleburne Living Ctr., Inc.,
473 U.S. 432 (1985) 5, 6

Coleman v. Aycock, 304 F. Supp. 132 (N.D. Miss. 1969) . 8

Comfort ex rel. Neumyer v. Lynn School Comm,
283 F. Supp. 2d 328 (D. Mass. 2003) 20, 24, 25

Cortes-Quinones v. Jimenez-Nettleship,
842 F.2d 556 (1st Cir.1988) 12

Craig v. Boren, 429 U.S. 190 (1976) 21

David K. v. Lane, 839 F.2d 1265 (7th Cir. 1988) 14, 29

Dawson v. Delaware, 503 U.S. 159 (1992) 15, 16, 24

Edwards v. Sard, 250 F. Supp. 977 (D. D.C. 1966) 10

Ehrlich v. Town of Glastonbury, 348 F.3d 48
(2d Cir. 2003) 5

Escalera v. Terhune, 2004 WL 238763
(Cal. App. Feb. 10, 2004) 6

Falls v. Nesbitt, 966 F.2d 375 (8th Cir. 1992) 12

Farmer v. Brennan, 511 U.S. 825 (1994) 12

Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) 8, 21

Grutter v. Bollinger, 539 U.S. 306 (2003) ..... *passim*

Harper v. Wall, 85 F. Supp. 783 (D. N.J. 1949) 8

Hampton v. Jefferson Cty. Bd. of Educ.,
102 F. Supp. 2d 358 (W.D. Ky.2000). 24

Harris v. Greer, 750 F.2d 617, 619 (7th Cir.1984) 14, 19, 24

J.E.B. v. T.B., 511 U.S. 127 (1994) 6

Jacobson v. Cincinnati Bd. of Educ.,
961 F.2d 100 (6th Cir.1992) 23

Jensen v. Clarke, 94 F.3d 1191 (8th Cir. 1996) 13, 17

Johnson v. California, 321 F.3d 794 (9th Cir.),
reh'g and reh'g en banc denied,
336 F.3d 1121 (9th Cir. 2003) ..... *passim*

Jones v. Bertnard, 2003 WL 22301219
(10th Cir. 2003) (unpublished) 13

Kromnick v. School Dist., 739 F.2d 894 (3d Cir.1984) .. 23

Ladue v. Gilleo, 512 U.S. 43 (1994) 18

City of Littleton v. Z.J. Gifts, 124 S.Ct. 2219 (2004) 26

Korematsu v. United States, 323 U.S. 214 (1944) 22

Loving v. Virginia, 388 U.S. 1 (1967) 7, 23

McClelland v. Sigler, 456 F.2d 1266
(8th Cir. 1972) (*per curiam*) (1967) 21

M'Culloch v. Maryland, 17 U.S. 316 (1819) 17

McLaughlin v. Florida, 379 U.S. 184 (1964) 9, 22

Mooring v. San Francisco Sheriff's Dept.,
289 F. Supp. 2d 1110, (N.D. Cal. 2003) 18

Morrison v. Garraghty,
239 F.3d 648 (4th Cir. 2001) 6

Nguyen v. United States, 533 U.S. 53 (2001) 19

Palmer v. Thompson, 391 F.2d 324 (5th Cir. 1967),
aff'd, 403 U.S. 217 (1971) 8

Pargo v. Elliott, 69 F.3d 280
(8th Cir. 1995) (*per curiam*) 7, 21

Petit v. City of Chicago, 352 F.3d 1111 (7th Cir. 2003) ... 1

Pitts v. Thornburgh, 866 F.2d 1450
(D.C. Cir. 1989) 7, 19, 30

Plessy v. Ferguson, 163 U.S. 537 (1896) 8, 23

Plyler v. Doe, 457 U.S. 202 (1982) 22

Powers v. Ohio, 499 U.S. 400 (1991) 22, 25

Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) 20

Reed v. Reed, 404 U.S. 71 (1971) 6

Republican Party of Minn. v. White,
536 U.S. 765 (2002) 18

Rojas v. Cambra 1997 WL 294409 (N.D. Cal.1997) 19

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 11,18

Robinson v. Prunty, 249 F.3d 862 (9th Cir. 2001) 14

Romer v. Evans, 517 U.S. 620 (1996) 10

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 7

Saucier v. Katz, 533 U.S. 194 (2001) 5

Shaw v. Murphy, 532 U.S. 223 (2001) 5

Spain v. Procunier, 600 F.2d 194 (9th Cir. 1979) 5

Stefanow v. McFadden, 103 F.3d 1466 (9th Cir.1996) ... 14

Stockwell v. *Phelps*, 20 F.3d 187 (5th Cir. 1994) 21

Swain v. Alabama, 380 U.S. 202 (1965) 9

Sweeney v. Woodall, 344 U.S. 86 (1952) 8

Tahoe-Sierra Preservation Council, Inc
v. Tahoe Regional Planning Ag'y, 535 U.S. 302 (2002) .26, 27

Thornburgh v. Abbott, 490 U.S. 401 (1989) 19

Tillery v. Owens, 907 F.2d 418 (3d Cir. 1990) 13, 14

Turner v. Saffley, 482 U.S. 90 (1987) 6, 7

United States v Bailey, 444 U.S. 394 (1980) 14

United States v. Coonan, 938 F.2d 1553 (2d Cir. 1991) .. 15

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 22

United States v. Fordice, 505 U.S. 717 (1992) 29

United States. v. Shryock, 342 F.3d 948
(9th Cir. 2003) 15, 16

United States v. Virginia, 518 U.S. 515 (1996) 6, 17, 22

Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 28

Virginia v. Black, 538 U.S. 343 (2003) 23, 25

Washington v. Harper, 494 U.S. 210 (1990) 7

Walsh v. Mellas, 837 F.2d 789 (7th Cir.1988) 15, 17

Washington v. Lee, 263 F. Supp. 327 (M.D. Al. 1966),
aff'd sub nom. Lee v. Washington,
390 U.S. 333 (1968) (*per curiam*) ..... *passim*

Wessmann v. Gittens, 160 F.3d 790 (1st Cir.1998) ... 17, 18

White v. Morris, 832 F. Supp. 1129 (S.D. Ohio 1993) .. 26

Whitley v. Albers, 475 U.S. 312 (1986) 7

Wilson v. Seiter, 501 U.S. 294 (1991) 7

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 16

Wood v. Vaughan, 209 F. Supp. 106 (W.D. Va. 1962) ... 8

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 12, 30

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 23

Zadvydas v. Davis 533 U.S. 678 (2001) 26

Statutes

Prison Rape Elimination Act of 2003, Pub. L 108-79 . 13, 14

45 ALA. CODE §§ 4, 52, 121, 122, 123, 172, 183 (1958) .. 7

Other Authorities

ANTI-DEFAMATION LEAGUE, DANGEROUS CONVICTIONS: EXTREMIST RECRUITMENT IN AMERICA'S PRISONS (2002) 14

J. DIIULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT (1987) 16

ENCYCLOPEDIA OF AMERICAN PRISONS (M. MCSHANE & F. WILLIAMS, EDS., 1996) 12

HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001) 15

Indictment, United States v. Barry Byron Mills (N.D. Cal. Feb. 5, 2002) 15, 16, 24

J. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT (1983) 19

M. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213 (1991) .. 9

Y. Mastin, *Rico Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process*, 2001 WILLIAM MITCHELL L. REV. 2295 15

D. OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997) 9

See J. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91 (1987) 13, 14

W. Rideau & B. Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1061 (1985) 24

J. Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427 (1997) 19, 28

M. Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999) 9

U.S. DEP'T. OF JUSTICE, PRISON GANGS: THEIR EXTENT, NATURE AND IMPACT ON PRISONS (1985) 14, 16

Interest of *Amicus Curiae*[*]

The National Association of Black Law Enforcement Officers, Inc. ("NABLEO") is comprised of more than 1,500 individual members in 40 chapters, including many who serve as corrections officers in our Nation's prisons and jails. NABLEO members know first hand the serious problems of racial discrimination that continue to plague the administration of criminal justice, and it is a central aim of our organization to build a system that more fully lives up to constitutional ideals of fairness and equality. NABLEO and its chapters have played a leading role in reforming police practices that breed distrust of law enforcement in minority communities. NABLEO members are also acquainted with the harsh realities of prison life and the salient role that race and race-based violence play in many institutions.

Our experience as law enforcement professionals strongly confirms what recent decisions of this Court and others have recognized: that accomplishment of important objectives – including basic public safety responsibilities – will sometimes require the adoption of policies that take race into account. *See, e.g., Grutter v. Bollinger,* 539 U.S. 306 (2003); *Petit v. Chicago*, 352 F.3d 1111 (7th Cir. 2003) (acknowledging "compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city like Chicago").

In agreement with those decisions, we do not believe that sustaining such necessary policies is in any way incompatible with vigilance in rooting out invidious discrimination. There is, we believe, a fundamental difference between such policies and those predicated on racial bias and stereotypical thinking – one which federal Equal Protection review can – and must – take account of.

---

[*]No counsel for any party authored this brief in whole or in part, and no person or entity made a monetary contribution for its preparation or submission. Both parties have consented to its filing. Sup. Ct. R. 37.3, 37.6.

Summary of Argument

California prison officials, under a constitutional obligation to protect inmates from the predations of racially motivated prison gangs – and mindful of the special difficulty of protecting inmates within their cells – have adopted a two-stage process for assigning inmates to double cells. Permanent assignments are made on an individualized (non-racial) basis, with substantial weight given to the preferences of individual inmates. There is thus no bar to inmates of different racial and ethnic backgrounds sharing a cell on a permanent basis.

During the time that the initial evaluation is being conducted, however, Defendants take a different approach. In addition to separating inmates based on incompatibility that is known or immediately evident (*e.g.*, age, physical size, prior testimony, or known gang membership), Defendants assign inmates to reception center cells based on characteristics, both racial and non-racial, that correlate with prison gang fault-lines. Thus, there is a "[p]retty close to zero percent" chance, *see* 321 F.3d at 794, that a white and African-American inmate will be placed in the same cell during the intake process – or that Mexican-American inmates from Northern and Southern California will be. *See* 321 F.3d at 800 n.9 (describing violent hostility between "Northern" and "Southern" Mexican-American prison gangs). It is undisputed that the common areas, where surveillance and protection (while still difficult) are more practicable than inside cells, are racially integrated. Nor is it alleged that Petitioner was treated unfairly on account of race during the assessment process – or that the housing policy in any way singles out any racial or ethnic group for more (or less) favorable treatment.

We believe that the court of appeals was correct to reject Petitioner's claim that consideration of race during the evaluation phase of the assignment process was a denial of Equal Protection. But we do not agree that the standard of review is "paramount" or that, as the court appeared to assume

– and Petitioner argues – sustaining Defendants' policy entails turning away from *Lee v. Washington*. As we show, recognizing that *Washington* was rightly decided – or treating it as having applied the full range of strict scrutiny principles articulated in subsequent decisions – would not condemn California's policy.

In addition to emphasizing the importance of context, the Court's recent Equal Protection cases instruct that the ultimate object of heightened scrutiny is to differentiate government policies, such as the one condemned in *Washington*, which are predicated on illegitimate racial considerations, from practices – such as the ones here at issue – which consider race only in order to accomplish compelling – and genuinely non-invidious – public aims.

The undisputed facts about the operation of Defendants' practices establish that both aspects of the strict scrutiny test are satisfied, *i.e.*, that the objective pursued is "important enough" to warrant use of racial classification *and* that there is "little or no possibility" that any invidious motive or stereotypical assumption is at work. *Grutter*, 539 U.S. at 339 (quoting *City of Richmond v. J.A. Croson Co.*,488 U.S. 469 (1989)). Defendants' avowed objective – protecting individuals (of all races) against cellmate violence, during the limited time needed to make an informed, individualized assessment of their dangerousness and vulnerability – is plainly a compelling one.

Equally important, it is manifest that this objective – and no constitutionally illegitimate consideration – actually and fully accounts for Defendants' actions. Not only do numerous aspects of the policy attest to a special concern with preventing violence – and gang-motivated violence, especially – within cells, but the fact that Defendants make *permanent* assignments on an individualized basis – and readily authorize assignment of inmates of different races to the same double cells – answers any concern that reception center housing policy is animated by stereotypical assumptions about racial inferiority or race-based differences – or even a generalized belief that inmates of

different races cannot be housed together. Indeed, Petitioner's Equal Protection claim derives almost all its plausibility from a highly questionable premise: that Defendants maintain two distinct policies – a temporary one, which "segregates" inmates at reception centers, and a "second," policy, which fully complies with their Equal Protection duty, by permanently assigning those same individuals to cells on a non-racial basis, based on information developed during the evaluation stage.

Finally, to the extent that Petitioner asserts that the policy should be adjudged unconstitutional – in the *absence* of any illegitimate racial considerations – based on its supposed "overinclusiveness," *e.g*, because of its application to transferee inmates, as well as those entirely new to the California system, or because safety objectives might be achievable by a reception center housing policy that gave less "weight" to the race "factor," such a ruling would be neither constitutionally warranted nor appropriate.

These objections are doubtful on their merits, and they do not sound in Equal Protection. Even outside the prison setting, this Court's precedents would not require a court (or entitle a § 1983 plaintiff) to demand a detailed demonstration of a policy's superior efficacy, *after* the defendant established that no plausible Equal Protection danger was lurking, and it requires no surrender of the principles of *Lee* or *Grutter* to see why such an inquiry would be especially ill-advised here. Not only do the questions raised implicate the core expertise of the Defendant officials, but they arise in a context in which the Equal Protection duty of individualized consideration is not the only (or even the most important) constitutional duty operating.

ARGUMENT

A. Upholding The Policy Does Not Require Departure From *Washington*

The Court of Appeals treated the "standard of review [a]s paramount," 321 F.3d at 798, implying that Defendants' policy

could be upheld only by rejecting *Lee v. Washington*, 390 U.S. 333 (1968) (*per curiam*), and imposing a "'heavy burden'" on inmate racial discrimination claims of every sort. 321 F.3d at 799 (quoting *Shaw v. Murphy*, 532 U.S. 223, 229 (2001)). Petitioner and *Amici* in turn describe the decision as announcing a rule that "racial segregation" within prison walls is entitled to an essentially irrebuttable presumption of constitutionality, Pet.Br.10, one which threatens to render the Equal Protection Clause "'a nullity in precisely the context where it is most necessary,'" *id.* at 29 (quoting *Spain v. Procunier*, 600 F.2d 189, 194 (9th Cir. 1979)).

We believe that these arguments – and the panel decision below – drastically overstate the extent of "diverge[nce]" between the available standards of judicial review, 321 F.3d at 799. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 478 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (cautioning against attaching undue importance to "[t]he formal label under which an equal protection claim is reviewed"). The "level of scrutiny" was not likely "outcome-determinative" in *Washington* – nor, as we show, would it be in this case: considering the policy under strict scrutiny standards would not call the judgment into question. *Cf.* 336 F.3d at 1121 (Ferguson J., dissenting from denial of *en banc* rehearing) (recognizing that it is "possible, even likely, that prison officials could show that the current policy meets the [strict scrutiny] test").[1]

As the Court of Appeals acknowledged, it is doubtful that the statutes and practices under consideration in *Washington*

---

[1]Because the judgment on appeal granted individual Defendants qualified immunity from § 1983 damages liability, affirmance is required even if the Court concluded that a different standard is applicable, unless it were further determined that the decision is compelled by clearly established law. *See Saucier v. Katz*, 533 U.S. 194, 200 (2001); *cf. Ehrlich v. Town of Glastonbury*, 348 F.3d 48, 60 (2d Cir. 2003) (*Saucier* does not entirely foreclose appellate court's affirming judgment on immunity grounds).

could survive meaningful judicial scrutiny under any formulation. *See* 321 F.3d at 798; *Cleburne*, 473 U.S. at 452 (1985) (Stevens, J.) (noting many governmental actions for which courts do not need "a special standard, or to apply 'strict scrutiny,' or even 'heightened scrutiny,'" to invalidate); *Reed v. Reed*, 404 U.S. 71, 75-77 (1971) (invalidating gender classification on rational basis review); *see also Morrison v. Garraghty*, 239 F.3d 648, 652, 655 (4th Cir. 2001) (applying *Turner* and finding Equal Protection violation); *compare also* ACLU Br.24 (arguing that *Turner* standard would validate race-based lockdown) *with Escalera v. Terhune*, 2004 WL 238763 (Cal. App. Feb. 10, 2004) (unpublished) (invalidating that policy under *Turner*).[2]

[2]Although we share concern that review be sufficiently rigorous, the United States overstates matters in suggesting that the decision below would result in all prison classifications' being subject to the same – "rational basis" – review. U.S.Br.18. At outset, when a government policy relies on classifications that trigger heightened review, courts focus on actual, rather than "conceivable" justifications for the policy. *See United States v. Virginia*, 518 U.S. 515, 533 (1996) ("The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation").

Nor do the arguments of Petitioner and *Amici* offer escape from doctrinal difficulty. If they were accepted, prison policies that treated inmates differently based on *religion* would warrant drastically lower "rational basis" review, *but see Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits"), and federal courts would either have to entertain claims of gender discrimination from every inmate incarcerated in a single-sex institution or relegate the right to free from discrimination on that ground to the rational basis category. *See J.E.B. v. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment) (noting "strong presumption that gender classifications are invalid").

That the "Court has acknowledged that there is a *continuum* of constitutional rights, some of which are more compatible with the exigencies of imprisonment than others," ACLU Br.16 (emphasis supplied), does not argue for a discontinuous, "all or nothing" approach to judicial review – let alone for making such decisions at a high level of generality, based on the Amendment the prisoner invokes, rather than the concrete nature of the claim

Plaintiffs in *Washington* challenged a series of laws adopted by the State of Alabama mandating that inmates throughout the State be permanently and strictly segregated according to race. *See* 45 ALA. CODE §§ 4, 52, 121, 122, 123, 172 &183 (1958). Both the context from which the statutes arose and their operation betrayed their true purpose: "invidious racial discrimination." *Loving v. Virginia*, 388 U.S. 1, 11(1967). As a matter of law and logic, the statutes could not be understood in isolation from the State's many other "measures designed to maintain White Supremacy," *id.* & n.11, *i.e*, laws that forbade racial integration, "on the ground that colored citizens are so inferior and degraded that they cannot be allowed to [public

asserted and specific interests advanced by the parties. *Compare Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989) (holding that *Turner* standard did not affect review of Equal Protection claim involv[ing] "general budgetary and policy choices," but implying that more deference would apply if security interests were implicated); *Pargo v. Elliott*, 69 F.3d 280 (8th Cir. 1995) (*per curiam*) (determining first that there was no invidious gender discrimination, then that there was "substantial similar[ity]" between opportunities afforded male and female inmates, and then that remaining "differences were rationally related to legitimate penological interests").

Thus, while Judge Ferguson asserted that the Equal Protection Clause, like the bar on Cruel and Unusual Punishments, is "complementary" to prisons' mission, 336 F.3d at 1122. he did so the course of a decision that recognized that the challenged government actions could be constitutional, on a stronger evidentiary "showing" by Defendants. And although claims under the Cruel Punishments Clause may be unqualified by *"Turner,"* they are not adjudicated under an unvarying unitary standard. *Compare Wilson v. Seiter*, 501 U.S. 294 (1991), *with Whitley v. Albers*, 475 U.S. 312 (1986); *cf. County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (requisite level of fault for Due Process liability dependent on circumstances). The other suggested Amendment-based distinctions do no better: although the Equal Protection right is surely important, *all* prisoners' constitutional claims against States, assert rights that, *by definition*, are "fundamental," Pet.Br.29, *see Benton v. Maryland*, 395 U.S. 784, 794 (1969), and the distinction between rights "enjoyed" and "exercised," not only does a poor job of explaining the Court's cases, *see Washington v. Harper*, 494 U.S. 210 (1990), but would surely result in sustaining some of the least justifiable infringements while striking down some of the most reasonable ones.

facilities with] * * * white citizens." *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).[3]

Unsurprisingly, the Alabama regime drew no distinction between violent and non-violent offenders. It sought to maximize the extent of racial separation, and, of course, would have operated as an absolute bar to a (hypothetical) request by a African-American and a white inmate to be housed together – even though such freely-chosen arrangements could be expected to minimize the risk of in-cell violence.

And as was almost invariably the case wherever these invidious motives and assumptions were at work, the regime did not evince the slightest interest in providing equal – albeit "separate," treatment. *See, e.g., Gates v. Collier*, 501 F.2d 1291, 1299 (5th Cir. 1974) ("The practice at Parchman has been and is to maintain a system of prison facilities segregated by race through which black inmates are subjected to disparate and unequal treatment"). On the contrary, in Alabama (and elsewhere), the treatment of segregated African-American prisoners not only was vastly worse than that accorded whites, but was starkly redolent of the conditions of Antebellum slavery. *See, e.g., Harper v. Wall*, 85 F. Supp. 783, 785-87 (D. N.J. 1949) (granting relief to African-American prisoner who escaped from Alabama prison); *Sweeney v. Woodall*, 344 U.S. 86, 92-93 (1952) (Douglas, J., dissenting) (noting African-American petitioner's allegations that he had "been beaten by guards to the point of death [on Alabama chain gang] and will, if returned, be subjected to the same treatment"); *see also* D.

[3]Thus, in a number of jurisdictions, prison and jail policies were challenged – and overturned – in cases broadly attacking segregation in public facilities. *See, e.g., Coleman v. Aycock*, 304 F. Supp. 132 (N.D. Miss. 1969) (requiring desegregation of county jail, in lawsuit "encompass[ing] practically all public facilities operated by the county and city"); *Wood v. Vaughan*, 209 F. Supp. 106 (W.D. Va. 1962); *cf. Palmer v. Thompson*, 391 F.2d 324 (5th Cir. 1967) (non-inmates lacked standing to challenge jail segregation in omnibus public facilities desegregation suit), *aff'd on other grounds*, 403 U.S. 217 (1971).

OSHINSKY, WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1997); M. Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2027 (1999) (describing "prison systems of the former Confederate states * * *[that] were run for many years on a 'plantation' model [and] * * * were direct heirs to the slave plantation and the near-slavery systems of labor peonage and convict-leasing that succeeded the end of Reconstruction in the South").

Unsurprisingly, neither this Court's opinion in *Washington* nor that of the three-judge district court addressed or applied a particular standard of review. *Cf.* U.S.Br.4 (asserting that appeals court decision "refused to apply *Lee*'s presumption of unconstitutionality to the racial classification at issue in this case,"); Pet.Br.28 ("*Lee* was decided under the rule of strict scrutiny applied in *Brown* and its progeny").[4] This Court's one-paragraph *per curiam* opinion simply declared "without merit," 390 U.S. at 333, Alabama's arguments that its statutes were not-unconstitutional, and rejected as a misreading of the district court's decree the State's claim that it had made "no allowance for the necessities of prison security and discipline," *id.* at 334.

For its part, the district court opinion had rebuffed what it described as Alabama's "only defense" (essentially a rule of nonjusticiability): "that the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Al. 1966).

[4]Commentators have observed that neither *Brown* nor numerous civil rights cases decided in the ensuing decade articulated or explicitly applied "strict scrutiny." *See* M. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 255 (1991) (describing *McLaughlin v. Florida*, 379 U.S. 184 (1964), as the first case in which the Court "both articulated and applied a more rigorous review standard to racial classifications" and noting that approach was discarded, temporarily, the next Term in *Swain v. Alabama*, 380 U.S. 202 (1965)).

The opinion identified the regime's sweep and permanence as fatal defects, explaining that the court could "conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face *require complete and permanent segregation of the races* in all the Alabama penal facilities," *id.* at 331 (emphasis added). While so ruling, the decision "recognize[d] that there is merit in the contention that *in some isolated instances*[fn] *prison security and discipline necessitates segregation of the races for a limited period*," 263 F. Supp. at 331 (emphasis added),[5] but explained that "recognition of such instances does nothing to bolster the statutes or the general practice that requires or permits prison or jail officials to separate the races arbitrarily,"*id.* *Cf. Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating law under rational basis standard, because, *inter alia*, its "sheer breadth [was] discontinuous with the reasons offered for it").

Indeed, notwithstanding the undeniable invidiousness of Alabama's practices and the unequal treatment to which the State's African-American inmates were subjected, the three-judge court declined to order *immediate* desegregation of the State's maximum security prisons, instead stating an "expectation" that this would be accomplished within one year. Writing for the court, Judge Johnson explained:

> The operation of penal institutions, whether it be on a state-wide or local level, is a highly specialized endeavor, and the sober judgment of experienced correctional personnel * * * deserves the most careful consideration of this Court. In this connection, it is recognized that "the association between men in correctional institutions is closer and more fraught with physical danger and psychological pressures than is almost any other kind of association between human

[5]The court's footnote identified "the 'tank' used in the City of Birmingham and other large municipal jails where intoxicated persons are placed upon their initial incarceration and kept until they become sober," *id.* at 332 n.6 as one "isolated instance[]" where segregation could continue.

> beings." * * *

263 F. Supp. at 332 (quoting *Edwards v. Sard*, 250 F. Supp. 977 (D. D.C. 1966)).

B. Strict Scrutiny Would Not Invalidate The Policy

To the extent *Washington* is read – somewhat anachronistically – as having relied on the various "strict scrutiny" principles associated with this Court's later Equal Protection decisions, its application does not support invalidating the policy.

This Court has recently affirmed that because "[n]ot every decision influenced by race is equally objectionable," *Grutter*, 539 U.S. at 327, strict scrutiny is not a rule of *per se* invalidity, but rather a means for "distinguishing legitimate from illegitimate uses of race in governmental decisionmaking," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995) – "a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in [the] particular context." *Grutter*, 539 U.S. at 327; *see also id.* ("[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause").

Notwithstanding Petitioner's demand for a different, more through evidentiary showing, *see* Pet.Br.33 (faulting Defendants' "unquantitative" evidence), the record in this case supplies a sufficient basis on which the two constitutionally dispositive determinations can be made: (1) that Defendants are "pursuing a goal important enough to warrant use "of a highly suspect tool" and (2) "that there is little or no possibility that the motive for the classification [in this case] was illegitimate racial prejudice[,] stereotype," or any other objectionable considerations. *Croson*, 488 U.S. at 493. Indeed, contrary arguments rely on isolating Defendants' reception center housing policy from the context in which it operates: a broader assignment policy that comports fully with what *Petitioner*

identifies as the central mandate of Equal Protection: to treat inmates as individuals, rather than as members of racial groups.

1. Defendants Have A Compelling Interest In Protecting Inmates From Race-Based Violence During The Evaluation Process

This is not a case where the importance of the governmental objective is open to serious debate. *Compare, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J.) (questioning "role model" justification). As this Court has recognized, Defendants have both a compelling interest and a constitutional duty to protect individuals in their custody from violence at the hands of fellow inmates. *See Farmer v. Brennan*, 511 U.S. 825 (1994).

> Having incarcerated persons [with] demonstrated proclivit[ies] for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course.

Id. at 833 (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir.1988)) (quotation marks removed).

Nor is this a case where the defense of the governmental policy depends on amorphous "problems of prison administration," or potential "ripple effect[s]." *Turner*, 482 U.S. at 90. The dangers against which the policy is directed are grave and real. Although it is a commonplace that "prisons are dangerous places," *see, e.g. Falls v. Nesbitt*, 966 F.2d 375, 380 (8th Cir. 1992), such truisms cannot convey the staggering level of serious violence that pervades many institutions. Thus, statistical measurements are notoriously difficult, it has been estimated that as many as 70% of inmates are physically assaulted by other inmates each year, ENCYCLOPEDIA OF AMERICAN PRISONS (M. MCSHANE & F. WILLIAMS, EDS., 1996) at 379, and Congress recently found that "[t]he total number of

inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000," Prison Rape Elimination Act of 2003, Pub. L 108-79 § 2(1), codified at 42 U.S.C. § 16501(1).

Violence between cellmates poses an especially serious problem. As Defendants witnesses explained, the kind of surveillance that is (theoretically) possible in common areas cannot be achieved within cells. *See* 321 F.3d at 794 (noting testimony that "[s]taff cannot see into the cells without going up to them, and inmates are capable of placing coverings over the windows so that staff cannot see in them at all"); *see also Jensen v. Clarke*, 94 F.3d 1191, 1198 (8th Cir. 1996) (sustaining findings that "tensions [inside institution's double cells] are increased by the cell size, lack of privacy, the ineffective surveillance system, deterrents to reporting, * * * and the excessive amount of time spent on lockdown status"); *Jones v. Bertnard*, 2003 WL 22301219 (10th Cir. 2003) (unpublished) (distinguishing "risk of harm * * * from a prisoner's cellmate, with whom he might be locked up in close quarters" from that "in the exercise yard [where] numerous other inmates [are] present"); *Tillery v. Owens*, 907 F.2d 418, 424-25 (3d Cir. 1990) (citing examples of violent attacks resulting from inappropriate cellmate assignments).

These dangers are especially acute at the reception stage, when facts bearing on any individual inmate's dangerousness and vulnerability are not yet known – indeed, the entire purpose of this temporary confinement stage is to assess the individual, with an eye toward a permanent assignment that is safe and appropriate.

The initial period is critical in other respects. Although the evaluation process might be expected to provide incentive to demonstrate good behavior, a strong countervailing force exists: new arrivals have an interest in promptly convincing other inmates of their readiness to use violent force. *See* J. Robertson, *The Constitution in Protective Custody: An Analysis of the Rights of Protective Custody Inmates*, 56 U. CIN. L. REV. 91, 92

n.9 (1987) (noting that "a reputation for violence" is "a deterrent against victimization"). At the same time,"new inmates are usually tested by predators to determine if they will resist exploitation," *id.*; *see also* 42 U.S.C. § 15601(4) (congressional finding that "Young first-time offenders are at increased risk of sexual victimization. * * * – often within the first 48 hours of incarceration"); *accord United States v Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting); *Tillery*, 907 F.2d at 424 (noting problems when "inmates are * * * double-celled before they are evaluated").

As decisions of this Court and others attest, prison violence is an area in which race very much "still matters," *Grutter*, 539 U.S. at 333. Not only is interracial violence widespread, *see* 42 U.S.C. § 15601(6) (noting "frequently interracial character of prison sexual assaults"), but it is frequently perpetrated by gangs organized largely (though not exclusively) on racial lines, *Harris v. Greer*, 750 F.2d 617, 619 (7th Cir.1984), and supported by an ideology of racial hatred. *See* ANTI-DEFAMATION LEAGUE, DANGEROUS CONVICTIONS: EXTREMIST RECRUITMENT IN AMERICA'S PRISONS (2002) at 5 ("gangs, long a part of prison life, tend to form along racial or ethnic lines and use racism to recruit and fuel their activities, often indoctrinating new members with violent bigoted rhetoric and a strong animosity toward other races"); *Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir.1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry"); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001) (noting that "it is widely understood that members of different gangs or races would attempt to kill each other solely on the basis of gang membership or race"); U.S. DEP'T. OF JUSTICE, PRISON GANGS: THEIR EXTENT, NATURE AND IMPACT ON PRISONS (1985) 46 (finding that prison gangs accounted for 88% of all criminal incidents in California institutions); *David K.* v. *Lane*, 839 F.2d 1265, 1267 (7th Cir. 1988) (noting testimony that 75% to 99.5%

of facility's inmates were gang affiliated); *Walsh v. Mellas*, 837 F.2d 789, 796 (7th Cir.1988) (noting findings that "violence was rampant * * * and that gang influence pervaded the institution"); *Dawson v. Delaware*, 503 U.S. 159, 172 & n.1 (1992) (Thomas, J., dissenting) (collecting evidence of prison gang dangers).[6]

These gangs are dangerous because, as outside of prison, organized criminal activity poses a far greater danger than isolated antisocial behavior. *See United States v. Coonan*, 938 F.2d 1553 (2d Cir. 1991); *United States v. Barry Byron Mills* (N.D. Cal. Feb. 5, 2002) ("Mills Indictment") (criminal RICO and murder indictment of Aryan Brotherhood leadership); *id.* ¶¶11-12 (describing gang's structure); Y. Mastin, *Rico Conspiracy: Dismantles the Mexican Mafia & Disables Procedural Due Process*, 2001 WILLIAM MITCHELL L. REV. 2295, 2299 (quoting "constitution" of Mexican Mafia). Organized enterprises have additional motives for taking violent action and far more effective means of doing so – and of avoiding detection and punishment. Mills Indictment ¶6 (alleging that Aryan Brotherhood "uses murder and the threat of murder to maintain a position of power within the California and federal prison systems. Inmates and others who do not follow [gang's] orders * * * are subject to being murdered," as are "inmates who cooperate with authorities"); *id.* ¶8 ("members are required, when ordered, to kill without hesitation. They are also required to give false testimony in court on behalf of other members"); *United States. v. Shryock*, 342 F.3d 948, 969 (9th Cir. 2003) (describing operation of Mexican Mafia and

---

[6]As the recent report of an international human rights group explains:

> In the prison context, * * * the racial tensions that pervade U.S. society are significantly magnified * * * [R]acial divisions are one of the dominant features of inmate life. Prisoners' social relationships are largely determined by race; their gang affiliation, if they have one, is racially defined; and whatever racist beliefs they may have held prior to their imprisonment are likely to be significantly strengthened over the course of their stay in prison.

HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001).

sustaining conviction of its California leaders).

And as this Court's non-prison cases have also recognized, there are strong reasons – in addition to abstract notions of blameworthiness, *see Barclay v. Florida*, 463 U.S. 963 (1983) – why racially-motivated violence triggers special concern. *See generally Wisconsin v. Mitchell*, 508 U.S. 476, 488 (1993); Violence animated by group hatred is, by definition, nearly impossible to explain (or prevent) with reference to facts particular to the individuals involved; it is often more brutal than violence carried out for other reasons; and almost always more likely to provoke (group-based) retaliation, *see, e.g.*, 321 F.3d at 801 n.9 (noting that three days after incident in which white supremacists attacked Northern Hispanic inmates, "a riot involving 39 inmates occurred when Northern Hispanics attacked white inmates"); Mills Indictment ¶¶ 249-308 (describing Aryan Brotherhood "Race War With Black Inmates,"including, ¶261, "order" directed to all white inmates in federal prison "that any black inmate who used violence against a white inmate was to be murdered"); *cf. Dawson*, 503 U.S. at 166 (acknowledging likely relevance of "membership in an organization that endorses the killing of any identifiable group" to "future dangerousness" inquiry).[7]

For these reasons, an institution's *failure* to take into

[7]Far from constituting an exception to these patterns, the California system is widely acknowledged to be at their epicenter. As court opinions attest, the best-organized and most-feared national gangs began inside California prisons, *see Dawson*, 503 U.S. at 162 (stipulation that "the Aryan Brotherhood [is] a white racist prison gang that began in the 1960's in California"); *Shryock*, 342 F.3d at 961 (noting Mexican Mafia's origins in California prison); PRISON GANGS at 91-116 (same for Black Guerilla Family and Nuestra Familia) and (despite aggressive efforts of prison and law enforcement agencies), these and newer gangs continue to play a central, pernicious role in the State's prisons. *See, e.g.*, Mills Indictment; *see also* J. DIIULIO, GOVERNING PRISONS: A COMPARATIVE STUDY OF CORRECTIONAL MANAGEMENT 129 (1987) (describing prison gangs as "the chief operational fact of life inside California prisons").

account dangers of racial and gang violence can give rise to a claim of unconstitutional deliberate indifference. *See Robinson*, 249 F.3d at 866 (inmate alleged that defendants were "deliberately indifferent to the substantial risk that he would be seriously injured when he was placed in the prison yard with Mexican-American inmates"); *Walsh*, 837 F.2d at 799 (noting that, despite defendant officials' awareness of the "real and significant"risk of gang-related assaults, "they failed to institute procedures and safeguards in an attempt to determine whether an inmate to be housed with a gang member is targeted by that gang"); *Jansen*, 96 F.3d at 1200 (random assignment policy amounted to deliberate indifference).

2. The Record Establishes That No Improper Purposes Or Assumptions Are Operative

The evidence about the operation of Defendants' policy establishes that these important objectives actually – and fully – explain it. *See Grutter*, 539 U.S. at 328 ("reasons advanced by the governmental decisionmaker for the use of race in that particular context" must be "sincer[e,]" as well as "importan[t]"); *Virginia*, 518 U.S. at 533 ("justification must be genuine"); PLF Br.16 (careful judicial scrutiny ensures that government's explanations are not "'pretext[s] * * * for the accomplishment of objects not intrusted to the government'") (quoting *.M'Culloch v. Maryland*, 17 U.S. 316, 423 (1819)); *see also Wessmann v. Gittens*, 160 F.3d 790, 797-98, 802 (1st Cir.1998) (stressing that the necessity of a race-conscious policy is a "fact-sensitive inquiry" and that the "devil is in the details").

First, Defendants' cell assignment policies are narrowly and consistently focused on the danger of intra-cell violence. There is no effort to separate inmates in areas of reception centers in which behavior can be more readily monitored. *See* 321 F.3d at 797 & n.5 ("Inmates of all races work together, eat together, and use the yard together"). Indeed, the permanent policy – which generally gives effect to inmate choice – reflects the same concern: two inmates who seek to be housed with one another

are assumed to have determined that the chosen cellmate (whatever his racial background) poses a low threat of attack.

Moreover, the reception assignment policy gives comparable consideration to other, non-racial factors known to be correlated with gang membership and violence. *Compare Wessmann*, 160 F.3d at 798 (noting policy's narrow focus on *racial* diversity was incompatible with professed goal of "true diversity," *i.e.*, a "broad[] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"); *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) (stressing that "'underinclusiveness impairs the credibility of the government's rationale for speech restriction'") (quoting *City of Ladue v. Gilleo*, 512 U.S. 43 (1994)); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 579 (1993); *cf. Croson*, 488 U.S. at 506 (noting "random inclusion" of Eskimo- and Aleut-owned businesses in MBE program and observing that the "gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation"). Mexican-American inmates from Southern and Northern California, known members of rival African-American gangs, and inmates whose size, criminal history, or known personal animosity raises the possibility of violent interaction are also kept apart. *See* 321 F.3d at 794; *see also Mooring v. San Francisco Sheriff's Dept.*, 289 F. Supp. 2d 1110, 1112 (N.D. Cal. 2003) (noting acknowledgment "that *Norteño* [Northern California] gang members should not be celled with *Soreno* [*sic*] gang members"). Thus, even if "the chances of an inmate being assigned a cell mate of another race [are] '[p]retty close' to zero percent,'" that does *not* establish that race was the "dominant factor" – only that it was one of a number of factors (some non-racial; some group-based; and some specific to particular inmate combinations) deemed relevant enough to keep inmates apart during the time that an individualized evaluation is being performed.

Evidence concerning the Policy's operation likewise establishes the extreme implausibility that any *im*permissible consideration is at work. *See* J. Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 439 (1997) (strict scrutiny "serves to test the government's claim that a permissible state interest *fully explains* the law at issue") (emphasis added); *Pitts v. Thornburgh*, 866 F.2d 1450, 1455 (D.C. Cir. 1989) (heightened scrutiny assures "that the [Equal Protection] dangers posed [by classification] are not dangers in fact"); 321 F.3d at 800 (concluding that under policy, race is considered "'solely on the basis of [its] potential implications for prison security'") (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989)); *see also Harris*, 750 F.2d at 619 (discussing hypothetical policy of separating inmates in prison "where gang activity [was] rampant" and explaining that "[r]acial separation brought about by policies founded exclusively on a bona fide, colorblind concern for the safety of prisoners in our nation's dangerous prisons does not violate the equal protection clause"). *cf. Califano v. Webster* 430 U.S. 313, 317 (1977) (*per curiam*) (sustaining classification after determining that it was not predicated on "archaic and overbroad generalizations about women," and that "the only discernible purpose of more favorable treatment was [a constitutionally] permissible one"); *Nguyen v. United States*, 533 U.S. 53, 73 (2001) (concluding that challenged "distinction * * * is not marked by misconception and prejudice, nor does it show disrespect for either class").

Significantly, the setting is not one where race can be said to be irrelevant. *Compare Grutter*, 539 U.S. at 326 (racial classifications are suspect because race has "long [been] recognized as in most circumstances irrelevant"). As explained above, "racial conflict, including extreme violence and riots, is the reality of institutional life in prisons [in California and] around the country." J. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT (1983) at 81; *see also Rojas v. Cambra*,

1997 WL 294409, *6 n.13 (N.D. Cal.1997) (noting that "[e]stablishing discriminatory intent in the way prison officials handle prison gang activity is no easy task because many prison gangs are organized along racial lines and therefore require that prison officials take race into account").

In fact, Petitioner and *Amici* do not seriously contend that race is irrelevant – or that Equal Protection requires a race-blind policy under these circumstances. On the contrary, Johnson stresses that "the question presented here is *not* whether race must be disregarded entirely," in reception cell assignments, Pet. Br.36 (emphasis added), "but whether it is constitutional for the state to effectively ignore or subordinate all other factors in favor of a single-minded consideration of race as the predominant factor," *id.* And his *Amicus* cites as an exemplar an Oklahoma policy that, while eschewing a complete bar on "integrated cell assignments" for arriving inmates, provides that "[f]or reasons of safety and security, newly received inmates are *not* generally assigned randomly to racially integrated cells. *This is because the specific information needed to assess and inmates criminal and victimization history [is] not available until after the initial classification processing has been completed.*" Br. Former State Corrections Officials 10 (emphasis added).

That a governmental policy arises in a setting where race cannot practically or responsibly be ignored is a factor which must necessarily inform Equal Protection scrutiny. *See Raso v. Lago*, 135 F.3d 11, 16 (1st Cir. 1998) ("Every antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically 'suspect' under the Equal Protection Clause"); *see also Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999) (police manhunt based on victim's racial identification of perpetrator did not trigger strict scrutiny); *Comfort ex rel. Neumyer v. Lynn School Comm*, 283 F. Supp. 2d 328, 376 (D. Mass. 2003) ("When a government's ends are fundamentally

concerned with race – and those ends are recognized as compelling – it is natural that race-conscious means provide the 'snuggest fit' to those ends"); *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000); *cf. Craig v. Boren*, 429 U.S. 190, 220 (1976) (Rehnquist, J., dissenting) (classification should not be treated "as a talisman which – without regard to the rights involved or the persons affected – calls into effect a heavier burden of judicial review").

Moreover, there is no allegation that under the policy the inmates are treated differently on account of race. *Compare McClelland v. Sigler*, 456 F.2d 1266, 1267 (8th Cir. 1972) (*per curiam*) (noting that "living quarters at [whites-only] [c]ell [h]ouse are better than" integrated part of prison); *Stockwell* v. *Phelps*, 20 F.3d 187, 190 (5th Cir. 1994) ("white prisoners in two-man cells received preferential treatment over the cells occupied by black prisoners"); *Gates*, 501 F.2d at 1299 (finding "disparate and unequal treatment"); *cf. Pargo*, 69 F.3d at 281 (rejecting female inmates' Equal Protection claim, based on absence of "invidious discrimination" and findings of "substantial similari[ty]" of "programs and services available to women and men inmates as a whole").[8]

---

[8]The allegations in *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) illustrate facts, if sustained, would seem inexplicable on any ground other than invidious discrimination:

> [W]hen Black was hired as a laundryman's helper in the protective custody unit, he was assigned to assist the head laundryman who was white. As head laundryman, the white inmate was allowed outside of his cell for thirteen hours a day, seven days a week. Black, who was only the helper, was confined to his cell after 2:00 p.m. on weekdays and throughout the weekend. After the head laundryman resigned * * *, Black became the head laundryman and was given a white helper. Black might have thought that he had been promoted until he learned that the privileges associated with the two positions had changed. The head laundryman's helper was permitted outside his cell for thirteen hours a day and during weekends. The new head laundryman, Black, was still confined to his cell after 2:00 p.m. and on weekends.

Petitioner and *Amici* are obviously correct that facial even-handedness is not constitutionally dispositive, *see McLaughlin*, 379 U.S. at 191 ("Judicial inquiry under the Equal Protection Clause * * * does not end with a showing of equal application among the members of the class defined by the legislation"); *see also Powers v. Ohio*, 499 U.S. 400, 410 (1991) ("racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree").

But it does not follow that the absence of disparate treatment is constitutionally inconsequential. *See Grutter* 539 U.S. at 327 ("fundamental purpose" of strict scrutiny is to take 'relevant differences' into account") (quoting *Adarand*, 515 U.S. at 228). This Court's cases have consistently identified unequal, group-based disabilities as a central concern of Equal Protection. *See, e.g., Adarand*, 515 U.S. at 228 (careful scrutiny required "before permitting unequal treatment based on race to proceed"); *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) ("legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish") (citation omitted); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (suggesting "narrower scope for operation of the presumption of constitutionality when legislation [is motivated by] * * * prejudice against discrete and insular minorities"); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect").[9]

Departures from even-handedness obviously indicate that

[9]As Justice Scalia recently emphasized,"the famous [*Carolene Products*] footnote" – "the genesis of heightened standards of judicial review," *Virginia* 518 U.S. at 576 (Scalia, J., dissenting) – indicated that "searching" scrutiny would be limited to legislation whose impact is felt by a "'discrete and insular minorit[y]'" that is unable to employ the "'political processes ordinarily to be relied upon,'" *id.* (quoting 304 U.S. at 153 n.4).

a governmental actor's professed non-racial objectives are disingenuous and that impermissible considerations are likely at work. *See Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (Equal Protection does not permit law that is "impartial in appearance, yet * * * applied and administered * * * with an evil eye and an unequal hand"); 321 F.3d at 799 n.7 ("If * * *whites were treated more favorably in cell locations or privileges than blacks, the would likely be struck down under *Turner*").[10]

Nor should the *reason* the cited decisions gave for looking beyond facial even-handedness be disregarded: because such evidence alone did not negate the possibility that an especially pernicious purposes was at work. Thus, Justice Harlan's *Plessy* dissent observed that "[t]he thin disguise of 'equal' accommodations," *see* 163 U.S. at 562, "[could] not mislead any one," because "[e]very one knows that [Louisiana's segregation statute] had * * * the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons;" *accord Loving*, 388 U.S. at 11 (observing that the true purpose of anti-miscegenation laws was "to maintain White Supremacy"); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) ("the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group"); *Virginia v. Black*, 538 U.S. 343, 388 (2003) (Thomas, J., dissenting) (discussing Ku Klux Klan terror and observing that "'a page of history is worth a volume of logic'") (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.)).[11]

[10]Notably, each one of the disturbing examples of racial discrimination and of the widespread "perception of continuing racial discrimination," presented in the *Amicus* Brief of the ACLU relates to *unequal* treatment on account of race. *See, e.g.*, ACLU Br.11 (summarizing extent of agreement that "blacks are treated more harshly than whites in the criminal justice system"). But this case does not involve such claims.

[11]Numerous recent decisions have highlighted the Equal Protection significance of the fact that a race-conscious policy is "non-preferential," with some treating that feature as bearing on the level of scrutiny to be applied,

Although Petitioner and *Amici* half-heartedly suggest that, like the laws in *Plessy* and *Brown*, Defendants' policy should be "interpreted as a badge of inferiority stamped upon *minority* prisoners" – rather than an expression of "bona fide, colorblind concern for the safety of [all] prisoners," *Harris*, 750 F.2d at 619 – the evidence about Defendants' actual practices cannot bear that understanding. First, where prison gangs and racial violence are concerned, there is no "victim" or aggressor race. As noted above and in the opinions of this Court, *Caucasian* prison gangs in California are as deeply entrenched, as violent, and as deeply committed to racial hatred, as those comprised of other ethnic groups, *see Dawson* 503 U.S. at 172 n.1 (Thomas, J., dissenting) (collecting sources documenting Aryan Brotherhood's "hostility to black inmates," and record of violence and extremism); Mills Indictment, *supra*, and Defendants' policy shows precisely the same concern for assigning Mexican-American inmates from Northern and Southern California to different cells – an action that betrays no ethnic stereotype, but which is entirely consistent with a concern for preventing gang-inspired violence. And Defendants make no effort to separate inmates outside of cells. *See* W. Rideau & B. Sinclair, *Prisoner Litigation: How it Began in Louisiana*, 45 LA. L. REV. 1061, 1068 (1985) (white and black inmates "ate in the same dining hall, [but] a wooden partition ran down the center of the huge facility, separating their respective eating areas"); *Washington*, 261 F. Supp. at 331 (laws required "complete" segregation).

Most important, any assertion that the policy signals

Jacobson v. Cincinnati Bd. of Educ., 961 F.2d 100 (6th Cir.1992); *Kromnick v. School Dist.*, 739 F.2d 894 (3d Cir.1984), and others treating it as relevant to the *performance* of strict scrutiny analysis. *See Brewer*, 212 F.3d at 752; *Comfort*, 283 F. Supp. 2d at 363 (noting arguments for "intermediate scrutiny" of "policies that are race-conscious but do not * * * prefer members of one race over another," but holding that policy survived strict scrutiny); *see also Hampton v. Jefferson Cty. Bd. of Educ.*, 102 F. Supp. 2d 358, 380 (W.D. Ky.2000).

"second class citizenship" or even that it reflects an even-handed belief that "persons of different races cannot safely be housed together," U.S.Br.25, cannot be reconciled with Defendants' *permanent* assignment policies, which interpose no barrier to inmates of differing races sharing a cell and promote integration in dormitories.[12]

It should go without saying that both content of these policies and the objectives they advance – allowing African-American and white inmates to live together permanently by choice and affirmatively seeking integration in dormitories – would have been anathema to the officials in *Brown*, *Plessy*, and *Washington* to whom Petitioner and *Amici* casually analogize Defendants. *See also Black*, 538 U.S. at 393-94 & n.2 (Thomas, J., dissenting) ("It strains credulity to suggest that a state legislature that adopted a litany of segregationist laws self-contradictorily intended to squelch the segregationist message * * * *It is simply beyond belief that, in passing the statute now under review, the Virginia Legislature was concerned with anything but penalizing conduct [intimidating cross-burning] it must have viewed as particularly vicious"); *cf. Comfort*, 283 F. Supp. 2d at 378 ("Even if it were reasonable to conclude (and I find it highly doubtful) that students in Lynn come away from school registration with the mistaken belief that the district means to remind them of racial difference, everything about the Lynn experience is directed at clarifying and correcting this misapprehension").

The rejoinder, that "[t]he evils of state racial segregation do not dissipate merely because it is doled out only in successive

[12]Nor can Defendants fairly be accused of using inmates' race as a "proxy" for their proclivity to racial hatred or interracial violence, *see Powers*, 499 U.S. at 410. As the context in which it operates makes clear, Defendants reception housing policy is not reflective of an *assumption* that an individual inmate is racist or violent – but rather an indication that his proclivities, while being actively investigated, are not yet known.

60-day intervals, or because the inmate is not locked in a segregated cell for 24 hours a day," Pet.Br.40, misses the point. First, the distinction between "temporary" and permanent restrictions is not nearly as alien to constitutional law as this sound-bite argument supposes. *See Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Regional Planning Ag'y*, 535 U.S. 302 (2002) (temporary development moratorium not *per se* Taking); *City of Littleton v. Z.J. Gifts*, 124 S.Ct. 2219, (2004) (adult business licensing regime does not offend First Amendment, so long as bookstore owner may promptly seek judicial review of application denial); *cf. Zadvydas v. Davis* 533 U.S. 678, 692 (2001) – and *Washington* is not easily read as holding that the temporal dimension is *ir*relevant. See 263 F. Supp. at 331 (describing practice of "complete and permanent segregation" and recognizing instances where separation for a "limited period" might be warranted); *see also White v. Morris*, 832 F. Supp. 1129, 1134 (S.D. Ohio 1993) (temporary separation, after inmate records were destroyed, was consistent with consent decree because "the purpose of the * * * Decree was to ensure [prison's] *safe* integration") (emphasis in original).

But it is not the policy's limited duration in itself that is of pivotal constitutional relevance. Rather, it is the *function* that temporary reception center confinement undeniably serves: enabling Defendants to obtain accurate information on which inmates' permanent cell assignments can be determined. There is thus nothing mysterious, let alone constitutionally suspect, about "why cell assignments that are deemed safe on day 61 are presumptively unsafe on day 59 (or day 30, or day 10)," Pet. Br.37. The former are made after a process of individualized evaluation is complete, based on the information obtained. *Accord White*, 832 F. Supp. at 1133 ("Without the crucial information lost in those records, attempting integration could be dangerous to both staff and prisoners, and thus, random celling cannot proceed according to the consent decree"); Br. Former State Officials 10 n.10 (quoting policy that suspends

race-neutral assignments "until after the initial classification processing has been completed"); *cf. Tahoe-Sierra*, 535 U.S. at 340 (highlighting"interest in protecting the decisional process").

Indeed, what Petitioner and *Amici* identify as the central mandate of Equal Protection well describes the operation and evident object of Defendants' cell assignment practices: "'to ensure that each [inmate] is evaluated as an individual" – not in "a way that makes [his] race or ethnicity the defining feature of his [placement]." *Grutter*, 536 U.S. at 309.[13]

3. The Policy's Supposed "Overinclusiveness" Has No Bearing On The Equal Protection Question

To the extent that Petitioner urges that the policy be invalidated – notwithstanding the absence of any suspected invidious predicate – on "narrow tailoring" grounds, *i.e.*, based on the asserted insufficiency of evidence that Defendants' safety objectives would be frustrated by a policy that exempted transferee inmates or gave less "weight" to the race factor, the Equal Protection principles invoked do not support such a claim.

Most fundamentally, strict scrutiny cases do not establish "fit" between means and end as a free-stranding constitutional mandate, but rather describe that inquiry primarily as a tool for determining whether improper considerations were operative: "heightened scrutiny of a racial classification permits a court to conclude, in effect, 'If the state were really interested in race-neutral purpose x, it would not have done what it did,'" J. Rubenfeld, 107 YALE L.J. at 437. Once the list of possible Equal Protection "dangers" has been exhausted, the basis for demanding more or different evidence about a policy's comparative efficacy is at an end.

---

[13]Nor is there any contradiction whatsoever, let alone a constitutionally fatal one, between Defendants' consideration of race at the reception stage and their practice of encouraging racial integration "to minimize * * * violence in prison dormitories." U.S.Br.9. Each is fully consistent with taking a protective approach until the individual characteristics bearing on an inmate's dangerousness and vulnerability are reliably known.

Nor, in any event, is it right that narrow tailoring would require Defendants to disprove the feasibility of a "more flexible" consideration of race, *i.e.*, one that makes race one of a number of "factors" considered in assigning inmates to reception cells. As a threshold matter, (and as explained above) Defendants' reception center housing policy *does* treat race as "one of several factors" – in the respect that is most constitutionally meaningful. *See* p. 18, *supra* (explaining that policy is not suspiciously underinclusive).

At least as important, the reasons that make such an inquiry constitutionally significant in other settings are simply not implicated here. *See Grutter*, 539 U.S. at 334 (narrow tailoring test must be "calibrated to fit the distinct issues raised by the use of race" in particular context). In higher admissions cases, multi-factored consideration serves to ease the impact on those disadvantaged by a racial"plus" factor and to vindicate applicants' entitlement to individualized consideration. *See Regents, Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (Powell, J.) (Harvard approach assured that disappointed nonminority applicant's qualifications were "weighed fairly and competitively," leaving him "no basis to complain of unequal treatment under the Fourteenth Amendment"). But the policy challenged here does not "burden" the members of any group, *see Bakke*, 438 U.S. at 301 n.39, and the "benefit" with which the policy is ultimately concerned – (permanent) prison housing – *is* allocated on an individualized, entirely non-racial basis.

The legal regime urged by Petitioner and *Amici* would be fundamentally unadministrable, as well as constitutionally superfluous. The same "principle" cited as requiring Defendants to adduce objective, empirical support for making race a full disqualifying factor in cell assignment decisions would also require judicial determination of claims that a different policy gave "too much weight" to the race variable – or that prison administrators were *in practice* giving greater weight than prescribed in a stated policy. Such elaborate evidentiary

showings might be appropriate in a case where the government actor's actual motives are in doubt (or when a class is excluded from participating in a governmental benefit), *see, e.g.*, *Croson*, but such minute, fact-intensive scrutiny would be extraordinary (and quite probably counter-productive) in a case of a prison policy developed for non-invidious reasons. *Cf. United States v. Fordice*, 505 U.S. 717, 762 (1992) (Scalia, J., concurring in judgment in part, dissenting in part).[14]

Nor, to the extent the issue was preserved below, is the policy's application to transferee inmates, and not just truly new arrivals, the Equal Protection "smoking gun" it is suggested to be. There is no indication what particular illegitimate or racial purpose Defendants' treatment of transferees actually reveals – and while it may be true that transferred inmates and brand new arrivals are not identically situated, in the sense that more information is known about the former, such concerns speak

---

[14]The skepticism advocated by Petitioner's *Amici* is not readily cabined. Thus, the United States explains that the federal Bureau of Prisons *does* "consider race as one of many demographic factors, such as age, nationality, religion, and gang affiliation, to promote integrated and diverse institutions and housing units," U.S.Br.26, and that it "monitors the racial composition of its institutions and may consider race in overseeing the population of an institution as necessary to ensure that the institution does not become de facto segregated," *Id.*

Assuming that the stated interest in "diversity" and avoiding "de facto segregation" is security-based – *i.e.*, reflective of a (reasonable) judgment that housing inmates together can dampen racial tension – and not rooted in the First Amendment, *cf. David K.*, 839 F.2d at 1278 (Easterbrook, J., concurring) ("prison gangs [do not] meet every month to discuss * * * debate how Stanley Tigerman's buildings differ from those of the Bauhaus school"), the principles advanced in the *Amicus* Brief would require federal corrections officials to demonstrate these benefits at the institutional level *and* to show that the "amount" of consideration given race was not inordinate. As suggested above, similar showings could be required to sustain single-sex policies, which are far more likely than the policy here to rest (at least in part) on constitutionally troublesome thinking and entail far more serious claims of disparate treatment. *See* R. Herbert, *Women's Prisons: An Equal Protection Evaluation*, 94 YALE L. J. 1182 (1985).

more to the (relative) length of transferees' stay in the reception stage than to whether the policy should apply during that stage. In fact, some of the rationales underlying Defendants' policy are plainly applicable to transferees: because a reputation for "toughness" can be protective, *see supra*, transferred inmates have reasons to behave differently – more violently – on arrival at a new institution than they may have at the previous facility (and some transfers reflect a determination by the sending institution that the inmate's prior placement was inappropriate, *e.g.*, that he was more violent or trouble-prone than an initial evaluation had predicted). But accepting that transferees are, in fact, held for 60 days (a point on which there appears to be some uncertainty), a claim that transferees – of all races – are held for 60 days, rather than 14, if it sounds in Equal Protection at all, is a long way from the core concerns that animated *Washington*.

Finally, it would require no betrayal of strict scrutiny principles to see that this case is an extraordinary candidate for adopting the exceedingly demanding and rigid conception of "narrow tailoring" for which Petitioner argues. As *Grutter* teaches, even in – perhaps especially in – strict scrutiny analysis, "context matters," 539 U.S. at 334. *See also Pitts*, 866 F.2d at 1455 ("acknowledgment of the difficulties inherent in the prison context does not reduce or eviscerate heightened scrutiny, but it does recognize that those difficulties do not disappear once a party raises a discrimination claim"). And here, as in *Grutter*, the Equal Protection Clause is not the only constitutional provision requiring consideration. The policy implicates not only Defendants' professional expertise, but their constitutional duty to protect the lives and safety of those within their custody. *Cf. Wygant*, 476 U.S. at 291 (O'Connor, J., concurring).

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID T. GOLDBERG
Counsel of Record
99 Hudson Street, 8th Fl.
New York, NY 10013
(212) 334-8813